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No. 621

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In The Supreme Court of The United States

T. KIMBALL HILL,

Petitioner,

vs.

UNITED STATES OF AMERICA,
TREASURY DEPARTMENT,
INTERNAL REVENUE SERVICE,
DISTRICT DIRECTOR OF INTERNAL REVENUE,
INTELLIGENCE DIVISION,
SAN DIEGO COUNTY OFFICE,
LLOYD TUCKER, CHIEF INTELLIGENCE DIVISION,
CORWIN B. DeVOTIE, and EDWIN H. WORDELL,

Respondents.

PETITIONER'S SUPPLEMENTAL BRIEF

JAMES O. HEWITT, Esquire
For
HEWITT, KLITGAARD and
McMAHON
2123 U.S. National Bank Bldg.
San Diego, California 92101

Attorneys for Petitioner

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PETITIONER'S SUPPLEMENTAL BRIEF

INTRODUCTORY STATEMENT

Pursuant to Supreme Court of the United States Revised Rules, Rule 24 (4), Petitioner hereby submits supplemental authorities for consideration as part of T. Kimball Hill's Petition for Certiorari filed with this Court on September 27, 1965.

REASONS FOR GRANTING THE WRIT

2. The Constitutional Questions

B. The Sixth Amendment

In Dr. Hill's Petition for Certiorari it was contended that the principles enunciated in Escobedo v. Illinois, 378 U. S. 478 (1964), and Massiah v. United States, 377 U. S. 201 (1964) properly apply to tax fraud investigations. It was petitioner's belief that as such, a failure on the part of a Special Agent of the Internal Revenue Service to warn a taxpayer of his constitutional rights at the time a criminal investigation is undertaken constitutes a violation of the taxpayer's Sixth Amendment right to counsel.

However, due to the recentness of the Escobedo and Massiah decisions there were, to the petitioner's knowledge, no cases which had at that time considered this theory and applied it to the tax fraud area.

Coincidentally, however, the same day Dr. Hill's Petition for Certiorari was filed herein, a case was decided by the United States District Court for the District of Arizona which applied the Escobedo - Massiah rationale to a tax fraud situation not dissimilar to the one at bar.

In that case, United States v. Schoenburg, U. S. District Court, Phoenix No. C-16922, books and records belonging to Schoenburg were obtained from the taxpayer's accountant (with the taxpayer's ostensible permission) by a Special Agent (Corrigan) who had been introduced as "working with" the general agent (Leenerts).

Later, in a formal interview held at Internal Revenue offices, the same two agents succeeded in obtaining certain damaging statements from the taxpayer. Neither at the time of the interview nor at the time the records were obtained was the taxpayer or his accountant warned of the taxpayer's constitutional rights nor warned of the fact that a criminal investigation was underway.

The affidavit of Special Agent Corrigan indicates that no warning of any kind was given to Schoenburg and that in the agent's own words, he was introduced only by the statement, "This is Ryan Corrigan. He is working with me." It was the testimony of Schoenburg and his accountant that they turned over the records on the belief that the matter involved was a commonplace civil audit and that neither was aware of the criminal aspects of the investigation. In point of time, the taxpayer did not have counsel either when he turned over the records or when he was formally interrogated at the Internal Revenue offices.

Testimony also indicates that when the taxpayer did finally obtain counsel, the attorney arranged to see the transcript of the taxpayer's oral statement, only to have the statement snatched away when counsel attempted to make notes. In addition, later that same day, Special Agent Corrigan and General Agent Leenerts attempted to obtain additional books and records from the office of the taxpayer's accountant at a time when the accountant was out of his office. The employees of the accountant resisted this attempt in spite of coercive conduct on the part of the agents.

The legality of the agents' conduct relative to the taking of the taxpayer's oral statement and the seizure of his records was questioned on two separate occasions. Initially, there was a motion made to suppress the records and the oral statement as evidence as well as to quash the indictment. This motion was made and argued before Judge William C. Mathes and was grounded in the contention that the taxpayer's Fourth and Fifth Amendment rights had been violated. Based on what the court conceived to be the applicable law, Judge Mathes denied Schoenburg's motion and found no constitutional violation. This motion, however, was filed prior to the reporting of this Court's decision in Escobedo v. Illinois.

Following the publication of this landmark decision, a second motion was made by the taxpayer calling for the suppression of both the taxpayer's oral statement and his books and records on the ground that they were taken in violation of his Sixth Amendment right to counsel. Briefs were filed in support of the motion and in opposition to it with both briefs directed to the applicability of the Escobedo and Massiah decisions to tax fraud cases.

After hearing oral argument, the Court, in the person of District Judge Walter Craig, ordered the suppression as evidence of the taxpayer's oral statement. In granting a part of Schoenburg's suppression motion, the Court did not render an opinion and no reporter was present to record the argument.

Notwithstanding the absence of a formal opinion, the case does indicate at the very least that the philosophy of Escobedo and Massiah has been argued as being

applicable in the tax fraud area and that courts can be found apparently approving this application. As such, it is petitioner's belief that Schoenburg is just one of many cases which will soon pass on the applicability of Escobedo and Massiah to tax fraud cases and in so doing, necessarily determine whether Escobedo and Massiah require that an affirmative warning be given to the taxpayer.

Concerning the problem of "affirmative warnings" generally, it should be noted that Pennsylvania, one of the jurisdictions which formerly held that the Sixth Amendment does not require that the accused be affirmatively warned of his rights, has recently reversed its position in the case of Commonwealth v. Negri, ____A2d ___, 34 U. S. Law Week 2186 (Sept. 29, 1965). In so doing the Pennsylvania Court adopted the rule of the United States Court of Appeals for the Third Circuit as enunciated in Russo v. New Jersey, 33 U. S. Law Week 2621 (1965) - - requiring that an affirmative warning be given to the accused. In altering its position to conform to that of the Third Circuit, the Pennsylvania Supreme Court pointed out that it would be an unhealthy situation to have the Pennsylvania state courts adhering to one standard in this vitally important area while the federal courts across the street apply a different standard. As the court put it:

> "In order to alleviate and correct a regrettable situation, the clear indication for this court is to accept and follow the decision of the Third Circuit on this matter until some further word is spoken by the Supreme Court of the United States."

In light of the unquestioned constitutional importance of the "affirmative warning" doctrine, the dissension and confusion in the field, as well as the tremendous impact that the affirmation or denial of this doctrine will have on the criminal tax law, petitioner submits that the problem of "affirmative warnings" is ripe for determination by this Court and that the case at bar is an appropriate vehicle for making this determination.

Respectfully submitted,

/s/ JAMES O. HEWITT

For

HEWITT, KLITGAARD and McMAHON

Attorneys for Petitioner